A **TETRACON ENGINEERING SDN BHD**

v.

MANIKAN SOKAN

B COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF JCA
SULONG MATJERAIE JCA
HISHAMUDIN MOHD YUNUS JCA
[CIVIL APPEAL NO: W-03(IM)-114-2009]
C 27 JULY 2009

CIVIL PROCEDURE: *Summary judgment - Setting aside - Appeal - Summary judgment granted after registrar heard merits of application - Whether appropriate recourse was to appeal to judge in chambers against*
D *registrar's decision instead of applying to set aside before registrar - Rules of the High Court 1980, O. 14 r. 11*

CIVIL PROCEDURE: *Summary judgment - Setting aside - Appeal - Failure by defendant to provide any explanation for non-attendance of*
E *counsel - Whether appeal ought to be dismissed on this ground alone*

WORDS & PHRASES: *"Any judgment" - Rules of the High Court 1980, O. 14 r. 11 - Meaning of*

This was an appeal by the appellant/defendant against the decision
F of the High Court Judicial Commissioner ('JC') allowing the respondent's/plaintiff's appeal against the decision of the Senior Assistant Registrar ('registrar') who, *vide* encl. 91, had allowed the defendant's application to set aside an order for summary judgment obtained by the plaintiff. The JC allowed the plaintiff's appeal on
G the following grounds: (i) the defendant ought to have appealed to the judge in chambers against the registrar's decision in granting the plaintiff's application for summary judgment, instead of making an application to set aside before the registrar. The appropriate recourse was to appeal as the summary judgment order was made
H after the registrar had heard the merits of the plaintiff's application; and (ii) the defendant, when making the application to set aside, had failed to furnish any reason whatsoever for the absence of its counsel.

I

Held (dismissing the appeal)
Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

(1) It was true that the registrar granted the application for summary judgment after hearing the plaintiff's counsel's submission and considering the merits of the application. However, O. 14 r. 11 of the Rules of the High Court 1980 is clear. It merely states "Any judgment …", and did not specify the nature or type of judgment made. The provision makes no distinction between a judgment obtained after hearing the merits and a judgment obtained without hearing the merits. What r. 11 means is that as long as the judgment was obtained in the absence of a party, the aggrieved party may apply to set aside the judgment pursuant to this rule. (para 16)

(2) Upon examination of the defendant's affidavits in support of encl. 91, this court was of the view that the JC was correct in her finding that the defendant had failed to provide any explanation for the non-attendance of its counsel. In fact, the defendant's counsel concerned did not affirm any affidavit at all. On this ground alone, the defendant's appeal ought to be dismissed. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh perayu/defendan terhadap keputusan Pesuruhjaya Kehakiman Mahkamah Tinggi ('PK') membenarkan rayuan responden/plaintif terhadap keputusan Penolong Pendaftar Kanan ('pendaftar') yang, melalui lampiran 91, telah membenarkan permohonan defendan untuk mengenepikan suatu perintah untuk penghakiman terus yang diperolehi oleh plaintif. PK membenarkan rayuan plaintif atas alasan-alasan yang berikut: (i) defendan sepatutnya merayu ke hakim dalam kamar terhadap keputusan pendaftar membenarkan permohonan plaintif untuk penghakiman terus, dan bukan membuat suatu rayuan untuk mengenepikan di hadapan pendaftar. Jalan yang berpatutan ialah untuk merayu disebabkan perintah penghakiman terus itu dibuat selepas Pendaftar telah mendengar merit-merit permohonan perayu; dan (ii) defendan, apabila membuat permohonan untuk mengenepikan, telah gagal untuk memberi apa-apa sebab pun bagi ketiadaan peguamnya.

Diputuskan (menolak rayuan)
Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

(1) Ia adalah benar bahawa Pendaftar membenarkan permohonan untuk penghakiman terus selepas mendengar hujahan-hujahan peguam plaintif dan menimbangkan merit-merit permohonan itu. Walau bagaimanapun, A. 14 k. 11 Kaedah-kaedah Mahkamah Tinggi 1980 adalah jelas. Ia hanya menyatakan "Apa-apa penghakiman ...", dan tidak menetapkan sifat atau jenis penghakiman yang dibuat. Peruntukan itu tidak membezakan di antara sesuatu penghakiman yang diperolehi selepas mendengar merit-merit dan sesuatu penghakiman yang diperolehi tanpa mendengar merit-merit. Apa yang dimaksudkan oleh k. 11 ialah asalkan penghakiman itu telah diperolehi dalam ketiadaan sesuatu pihak, pihak terkilan boleh memohon untuk mengenepikan penghakiman itu menerusi kaedah ini.

(2) Setelah meneliti afidavit-afidavit defendan yang menyokong lampiran 91, mahkamah ini berpendapat bahawa PK betul dalam dapatannya bahawa defendan telah gagal untuk menyediakan apa-apa penjelasan bagi ketidakhadiran peguamnya. Sebenarnya, peguam defendan tidak mengesahkan apa-apa afidavit pun. Atas alasan ini sahaja, rayuan defendan seharusnya ditolak.

Case(s) referred to:
Perwira Habib Bank Malaysia Berhad v. Yap Yeng Seng [1989] 1 CLJ 1101; [1989] 2 CLJ (Rep) 252 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 3 r. 6, O. 14 r. 11

For the appellant - Gideon Tan (Tan Yew Aik with him); M/s Gideon Tan Razali Zaini
For the respondent - Arunachalam Ramiah (Lalitha Nagamuthu & Cik Shirin with him); M/s Arun & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S9(S7)-22-766-2004]

Reported by Suresh Nathan

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] This is an appeal from the decision of the learned Judicial Commissioner of the High Court Kuala Lumpur (Civil Division) who, on 24 April 2009, had allowed the plaintiff's appeal (*vide* encl. 120) against the decision of the learned senior assistant registrar ('the registrar'). The registrar on 6 November 2008, *vide* encl. 91, had allowed the application of the defendant (now, the appellant before us) to set aside an order for summary judgment obtained by the plaintiff (now, the respondent before us) on 23 June 2008.

[2] We have dismissed the appeal with costs. We now give the grounds of our decision.

[3] In this judgment, for the sake of convenience and clarity, we will be referring to the appellant as 'the defendant', and the respondent as 'the plaintiff'.

[4] In the present case, the writ action against the defendant was filed by the plaintiff on 24 May 2004.

[5] The plaintiff is a provider of transportation services. The defendant had engaged the services of the plaintiff to transport and deliver goods to various destinations. The defendant had made payments to the plaintiff for the services but the plaintiff claims that there is still an outstanding amount. In the action at the High Court, the plaintiff is claiming repayment for the unpaid amount of RM1,392,262.72.

[6] The defendant filed its statement of defence on 14 December 2004. In its statement of defence the defendant disputes the plaintiff's claim, and alleges that the services rendered by the plaintiff were inefficient and had caused the defendant to incur losses.

[7] On 1 April 2005 the plaintiff filed an application for summary judgment pursuant to O. 14 of the Rules of the High Court 1980 ('the RHC'). After a long adjournment (due to reasons which we think are not relevant for the purpose of this appeal), the application was finally fixed for hearing on 23 June 2008. However, on the day of the hearing, the counsel for the defendant

was absent. The registrar, nevertheless, proceeded to hear the summary judgment application and made an order in favour of the plaintiff based on the merits of the application.

[8] Thereafter the defendant made an application before the registrar to set aside the order for summary judgment. The reasons given for the application were that, firstly, the defendant was not informed by the plaintiff of the O. 14 application; and, secondly, the defendant has merit in its defence against the plaintiff's claim.

[9] The registrar, having heard arguments, granted the defendant's application and set aside the order for summary judgment.

[10] The plaintiff, being dissatisfied with the setting aside order of the registrar, appealed to the judge in chambers. The learned Judicial Commissioner allowed the plaintiff's appeal.

[11] Hence the appeal by the defendant, that is now before us.

[12] In our judgment there is no merit in any of the arguments raised by the defendant before us.

[13] An application to set aside a summary judgment order must be made pursuant to O. 14 r. 11 of the RHC. The rule provides:

> **Rule 11. Setting aside judgment. (O. 14 r. 11)**
>
> Any judgment given against a party who does not appear at the hearing of an application under rule 1 or rule 5 may be set aside or varied by the Court on such terms as it think just.

[14] In *Perwira Habib Bank Malaysia Berhad v. Yap Yeng Seng* [1989] 1 CLJ 1101; ([1989] 2 CLJ (Rep) 252) Dr. Zakaria Yatim J (as he then was) dealt with the principles pertaining to the rule. The learned judge said at p. 1105 (p. 255):

> In the instant case the plaintiff made an application for summary judgment and the defendant and his Counsel were absent on the date of hearing before the Senior Assistant Registrar. An application to set aside the judgment in the absence of the defendant must be made under O. 14 r. 11 of the Rules. See *Jaya Leasing Sdn. Bhd. v. Madai Shipping Sdn. Bhd. & Ors.* (Kuala Lumpur CS C4-23-2942-86). (Unreported).

The principles on which judgment in default may be set aside under O. 14 r. 11 are the same as those under O. 13 r. 9. See the *Supreme Court Practice*, 1988, Vol. 1, p. 163. The rule for setting aside judgment in default under O. 13 r. 19 is that "where the judgment was obtained regularly there must be an affidavit of merits meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence." *Evans v. Bartlam.* Apart from this rule, the Court would wish to be fully satisfied as to the reason for the non-attendance at the hearing of the summons of the party against whom judgment was given under O. 14. *The Supreme Court Practice, supra.* p. 163.

[15] The first ground of the learned Judicial Commissioner in allowing the plaintiff's appeal is that the defendant ought to have appealed to the judge in chambers against the registrar's decision in granting the plaintiff's application for summary judgment, instead of making an application to set aside before the registrar. The learned Judicial Commissioner was of the view that to appeal was the appropriate recourse as the summary judgment order was made after the registrar had heard the merits of the plaintiff's application. She did not cite any authority for her view.

[16] With respect we are unable to agree with the view of the learned Judicial Commissioner. It is true that the registrar granted the application for summary judgment after hearing the plaintiff's counsel's submission and considering the merits of the application. However, the provision of r. 11 above is clear: it merely states 'Any judgment ...'. It does not specify the nature or type of judgment made. The provision makes no distinction between a judgment obtained after hearing the merits and a judgment obtained without hearing the merits. In our view, what r. 11 means is that as long as the judgment was obtained in the absence of a party, the aggrieved party may apply to set aside the judgment pursuant to this rule.

[17] The second ground of the learned Judicial Commissioner for allowing the plaintiff's appeal before her is that the defendant, when making the application to set aside, had failed to furnish any reason whatsoever for the absence of their counsel. We have examined the defendant's affidavits in support of encl. 91 and, with respect, we are of the view that the learned Judicial Commissioner was correct in her finding that the defendant had failed to provide any explanation for the non-attendance of their

A counsel. In fact we note that the defendant's counsel concerned did not affirm any affidavit at all. On this ground alone the defendant's appeal before us ought to be dismissed.

[18] We further find that there is no merit in the defendant's
B argument that the defendant was not served with the cause papers and hence the judgment was irregular. The defendant at the material time was represented by solicitors, namely, Messrs Muhammad Ganesan & Nazri. This being the case, there was no obligation on the part of the plaintiff's solicitors to serve the cause
C papers or any notice on the defendant. The plaintiff's obligation was to serve the cause papers and notices (if any) to the defendant's solicitors – and this the plaintiff's solicitors did. The plaintiff has affirmed an affidavit stating that all cause papers, including a notification of the hearing date of 23 June 2008, have
D duly been served on the defendant's solicitors at the material time. The defendant in their affidavits has not rebutted the plaintiff's averments but merely alleges the irresponsible attitude of their solicitors in not updating them on the progress of the plaintiff's application.

E

[19] We wish to say that whilst it was wrong and irresponsible on the part of the defendant's solicitors in not updating their client (the defendant) on the progress of the case, it was equally wrong on the part of the defendant in not making inquiries with their
F solicitors from time to time. The obligations are mutual. It is not clearly stated in the defendant's affidavits as to when was the last time that they communicated with their solicitors, Messrs Muhammad Ganesan, but the learned counsel for the defendant, in his written submission, states that after 29 January 2007 (the
G date when the plaintiff's application to take accounts was dismissed by the court) the defendant did not receive any further updates from their solicitors. The defendant alleges that they had no knowledge about the progress of the case including the plaintiff's O. 14 application (see para 5 of the defendant's affidavit
H in support of their setting aside application). Now, this is remarkable as a litigant cannot adopt an indifferent or a lying down attitude. He must take an interest in his case and he must take the initiative – indeed, he has a duty – to find out from his solicitors about the progress of his case from time to time.

I

[20] Now, there is one final matter. Before us it is alleged by the learned counsel for the defendant in his written submission that the plaintiff intentionally concealed the fact that he took about a year to resume the court proceedings at the High Court after the dismissal of the plaintiff's application to take accounts on 29 January 2007. Counsel contends that the conduct of the plaintiff is in breach of O. 3 r. 6 of the RHC. Order 3 r. 6 stipulates:

> **6. Notice of intention to proceed after a year's delay (O. 3 r. 6)**
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> Where a year or more has lapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed.
>
> A summons on which no order was made is not a proceeding for the purpose of this rule.

[21] Our observation is that this allegation about a lapse in the proceeding is unfair and without substance. The truth of the matter is that, before resuming with his O. 14 application on 23 June 2008, the plaintiff had in January 2008 (that is to say, about six months earlier) made applications to amend the writ, statement of claim and summons in chambers (for the O. 14 application), which applications were not objected to by the defendant's solicitors who had been duly informed of the applications; and had duly obtained the necessary orders on 11 April 2008 (which orders were neither set aside nor appealed against by the defendant). Clearly there was no lapse in the proceeding as alleged.

[22] Accordingly, we are unanimous that this appeal be dismissed with costs. Deposit to the plaintiff to account of taxed costs.